



The Law Society

Adjudication in a matter raised by Dr Fenton Lewis

Law Society Freedom of Information Code

February 2010

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1 The Issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code ('the Code') when it refused to give Dr Fenton Lewis certain notes made by caseworkers from the Legal Complaints Service of their telephone conversations with a firm of solicitors against whom Dr Lewis had lodged a complaint of poor service.

2 The Background

As part of its investigation of Dr Lewis' complaint against a legal partnership (referred to here as H-LLP) the Legal Complaints Service (LCS) informed Dr Lewis that the partnership had denied ever having received a letter of complaint he said he had sent them in June 2008. Dr Lewis established that their denial had been made during telephone conversations the LCS caseworkers had had with a member of the partnership (referred to here as AR).

Dr Lewis asked the LCS to provide him with copies of the telephone attendance notes (TANs) made by the caseworkers during those conversations. On 5 November 2009 the LCS told him that he must make his request to the Information Compliance Manager of the Law Society. Dr Lewis therefore wrote on 10 November to the Law Society. He said that the denial by H-LLP of ever having received his complaint would itself be the subject of a complaint of dishonesty to the Solicitors Regulation Authority (SRA). Dr Lewis asked for 'copies of the caseworkers' notes (in order) to define this complaint'.

On 9 December Mr Bob Stanley, the Information Compliance Manager, replied, enclosing copies of TANs of conversations between Dr Lewis himself and the LCS, but Mr Stanley refused to let him have the notes made of conversations between the LCS and H-LLP, citing as the reason section 14.5 of the Code. Mr Stanley said that s.14.5 was a qualified exception, which meant that the Law Society had to consider 'whether the public interest requires us to give you the information'. Mr Stanley said that he considered the public interest in disclosure to be outweighed by that in withholding the notes, because they contained information on negotiations between the LCS and H-LLP which, if released into the public domain, might be prejudicial to future LCS investigations. Mr Stanley also informed Dr Lewis that he had the right of appeal to the Freedom of Information Adjudicator.

The following day Dr Lewis wrote to Mr Stanley formally requesting referral to the adjudicator and enclosing the reasons why he believed the material should be released.

On 13 January Mr Stanley informed me of Dr Lewis's request and provided hard copies of those documents which were most clearly relevant, including both the TANs which had been released and those which had been withheld from Dr Lewis.

On 14 January I invited the Law Society to make a submission in defence of its decision. I wrote also to Dr Lewis to say that, while it was for the Society to justify its refusal to give him the information, not for Dr Lewis to justify his request for it, he was welcome to make a submission over and above the reasons he had already expressed in his letter of 10 January.

3 Submission by Dr Lewis

Dr Lewis said he was appealing on two grounds: that the reason the Society had refused his the information was invalid, and that the public interest was overwhelmingly in favour of disclosure.

Dr Lewis said that he had received a letter from the LCS dated 15 April 2009, in which a caseworker said she was closing the file on his complaint. He said that the LCS had refused to answer further letters from him, and therefore there was no further LCS investigation which could be prejudiced by disclosure of the TANs. Dr Lewis also believed that, since the LCS was charged by the Law Society with handling complaints independently and in the public interest, there should be no 'negotiations' which were concealed from either party or from the public.

In respect of the public interest, Dr Lewis said that the alleged misconduct by H-LLP had been compounded by the firm in denying that it had ever received Dr Lewis' complaint. He said that there was abundant contextual evidence that these denials were dishonest. He had made many attempts to obtain from the caseworkers the exact circumstances of the denials, but without success. Dr Lewis believed it was now in the public interest that what he called such misconduct be investigated by the SRA without hindrance, and he therefore requested release of the documents.

4 Submission by the Law Society

The Law Society, in its submission on 28 January, said that, at the time of dealing with Dr Lewis's request, the manual LCS file had been with the Legal Services Ombudsman for review. The Society said that the TANs it had reviewed in response to the request were those held on the electronic version of the LCS file, but that since all LCS TANs were held electronically there would have been none on the manual file that were not reviewed.

The Society said that copies of the TANs between H-LLP and the LCS had been withheld under s.14.5 of the Code on the basis that they contained information about specific investigations, disciplinary cases or applications arising out of the Society's regulatory role. They contained information about conversations between the LCS and H-LLP aimed at facilitating conciliation in terms of the amount of compensation to be paid by the firm to Dr Lewis.

Referring to Mr Stanley's letter to Dr Lewis on 9 December 2009 in which he had said that 'the notes contain information on negotiations between the LCS and (H-LLP)' the Society said that he should have used the phrase 'attempts at conciliation' instead of the word 'negotiations' and it apologised for the error. It said that the process was very much one of conciliation rather than negotiation, with the LCS acting as 'honest broker' rather than as one of the two interested parties. The role of the LCS in these circumstances, said the Society, was analogous to that of ACAS when attempting to resolve an industrial dispute.

The Society said that the issue turned on the application of the public interest test: whether the public interest in disclosing the TANS was outweighed by a public interest in non-disclosure. The Society felt strongly that if there were to be an expectation on the part of solicitors that details of such conciliation discussions were to be made public then solicitors would be far less likely to engage in attempts at conciliation by the LCS. It would clearly be against the public interest, argued the Society, if as a result of such an expectation there were to be less likelihood of the LCS being able to facilitate conciliation between the complainant and the subject firm in such cases.

The Society then added that, having looked at Dr Lewis's request again, it believed that the specific TANS he had requested might not exist. The ones that were considered in response to his request (both those disclosed and those withheld) were kept on the electronic file, the manual file being with the Legal Services Ombudsman. The Society said that all TANS were held electronically so that 'it is extremely unlikely that there are any TANS on the manual file that are not also held on the electronic file'. It said that none of the TANS on the electronic file contained information on the denial allegedly made by H-LLP and referred to in Dr Lewis's FOI request. The Society said that it could be the case that no such denials were ever made.

The Society concluded its submission by saying that, in response to FOI requests, it could consider only information it holds and that is what it had done in this case.

5 Further enquiries

On 30 January, having considered the submissions and the TANS provided by the Law Society, I wrote to the Law Society to ask additional questions. These are summarised as follows:

5.1 I invited comment on the apparent discrepancy in the fact that the Law Society had said, first, that there would not have been information on its manual files which was not also held on its electronic files, and then, later, that it was only 'extremely unlikely' to have been the case.

5.2 I noted that Dr Lewis had claimed that AR's denial of having received his complaint had taken place in a telephone call with Ms Jones (one of the caseworkers) in January 2009 and then again with Ms Choudhury (the other caseworker) in February 2009. I noted that the Law Society had provided me with no

TANs dated earlier than 3 March 2009, and none at all involving Ms Jones. I asked for an assurance that no other TANs existed.

5.3 I noted that the TAN of a call with Dr Lewis dated 2 March 2009 (and released to Dr Lewis) showed Ms Choudhury as having told him: 'I could see the firm had stated it [Dr Lewis' complaint] was not received'. I asked the Law Society to explain where Ms Choudhury had 'seen' that, since according to the Society's submission it had not appeared in a TAN?

5.4 I noted that, in another TAN of a conversation with Dr Lewis, dated 6 March 2009 (also released to Dr Lewis), Ms Choudhury had written, in relation to his request for confirmation that the firm claimed not to have seen his letter of complaint: 'stated I had not been provided written confirmation as not required for all points by this office, and firm had reviewed files and confirmed by telephone'. I asked the Law Society how Ms Choudhury would have been able to tell Dr Lewis that the firm had confirmed its claim by telephone if there was no record in a TAN of it having done so.

5.5 I noted that, contrary to the assertion in the Law Society's submission, it appeared to me that the TAN of a conversation between Ms Choudhury and AR dated 20 April 2009 (and not released to Dr Lewis) did indeed contain information on the denial made by AR that his firm had received the letter of complaint dated 27 June 2008. I asked if I had misconstrued the contents of that TAN or if the Law Society had further comments to make about its contents. Similarly, I noted that the TAN of an earlier conversation between Ms Choudhury and AR on 11 March 2009 also contained information which was arguably about the denial, and again I invited the Law Society's comments.

5.6 Without prejudice to any future finding I might make on the balance of public interest in respect of disclosing information about the conciliation process, I asked what the Society's attitude would be to releasing redacted copies of the two TANs referred to in 5.5 above.

5.7 I noted the Law Society's regret at having originally referred to discussions between the caseworkers and the firm as 'negotiations' rather than as 'attempts at conciliation'. I asked what a complainant such as Dr Lewis is told, when making a complaint, about the way the conciliation process would operate. I noted that the TAN of Ms Choudhury's conversation with Dr Lewis on 26 February 2008 appeared to make no reference to the process of conciliation, but instead spoke of 'our statutory powers to award compensation'.

5.8 I questioned part of a TAN dated 11 March 2009 (not disclosed to Dr Lewis) of a conversation between Ms Choudhury and AR which raised questions for me about how the conciliation process worked. I told the Law Society that I wanted this information to assist me in assessing where the balance of public interest lay in disclosure of the full TANs.

5.9 Finally, I queried the meaning of references in several TANs to a 'ROM'. At the same time as asking the Law Society these questions I asked Dr Lewis if he could provide me with the source of his information that there had been telephone conversations between Ms Jones and AR in January 2009 and between Ms Choudhury and AR in February 2009. Dr Lewis provided a range of documents concerning his exchanges with the LCS (which it is not necessary to elaborate upon for purposes of this adjudication). Having reviewed the documents, Dr Lewis accepted that he might have been wrong about the January date for Ms Jones and that Ms Choudhury's conversation appeared to have taken place on 11 March.

6 The Law Society's response

On 12 February, saying that it had recently received the file on Dr Lewis' case back from the Legal Services Ombudsman, the Law Society responded to each of my nine additional questions in turn.

6.1 It said that its original submission had been based on a misunderstanding that all TANs were held on the electronic file, but it had now become clear that this was not necessarily the case. The Law Society said it apologised sincerely for this error. It said it now appeared that, during its investigation, the LCS had outsourced work on the case to a firm where Ms Jones had been a caseworker, and that since outside firms did not have access to the LCS electronic database they had to file all documents manually. As the Law Society had stated in its submission, it had had no access to the manual file at the time of handling Dr Lewis' original request. The Society acknowledged that it should perhaps have given Dr Lewis the opportunity to delay his request until the LCS had received the manual file back from the LSO.

6.2 The Society said it had now checked the manual file for any documents which had been added from the outsource firm. The Society provided the adjudicator with copies of TANS from the outsource firm of conversations they had had with H-LLP and with Dr Lewis. It also said that it had cross-referenced the electronic file and the manual file to ensure that no TANs had been missed or not recorded.

6.3 The Society said that the source Ms Choudhury had relied upon was an internal H-LLP memo dated 11 February 2009 and provided to her by the firm, and that a copy had been sent to Dr Lewis by Ms Jones on 20 February. The Society provided a copy for the adjudicator.

6.4 The Law Society said there was no TAN of a conversation in which H-LLP had confirmed not having any record of Dr Lewis' complaint. The Society said it did not know what this part of the TAN dated 6 March meant, and as the caseworker had now left the LCS it was not possible to ask her. The Society said that Ms Choudhury might have been referring to the internal H-LLP memo of 11 February or it could just simply be something Ms Choudhury had missed off the TAN.

6.5 The Law Society said there was an email from H-LLP to Ms Choudhury on 20 April confirming that they had checked their files and there was no letter from Dr Lewis dated 27 June 2008. The Law Society provided a copy for the adjudicator.

The Law Society said that the TAN of 11th March had been typed up at 15.25 and that H-LLP had returned the call at 17.25, confirming that they had not received the letter of 27th June. However, rather than create a new TAN, the caseworker had written this note by hand on the bottom of the first TAN. The Society provided a copy

for the adjudicator. The Law Society pointed out that this hand-written note would only have been on the hard copy file that was at the LSO at the time of Dr Lewis' request, so the Society would not have known about it when considering its response.

6.6 The Law Society said it had reconsidered the release of the two TANs referred to and had decided to release to Dr Lewis the TAN of 20 April 2009 in its entirety and the TAN of 11 March 2009 with four sentences redacted. The Society provided the adjudicator with the information it had decided to redact. It said the newly-released material would be sent to Dr Lewis immediately (on 12 February 2010).

6.7 The Law Society said that at the outset of his complaint Dr Lewis had been told of the statutory powers of the LCS, about how they operated and about the conciliation process. The Society attached for the adjudicator a copy of the initial letters the LCS had sent both to Dr Lewis and to H-LLP.

6.8 The Law Society said that because the caseworker in question no longer worked for the LCS it could only offer a possible explanation of what the TAN of Ms Choudhury's conversation with AR might have indicated about the conciliation process. The Society described the process as a sort of haggling technique on behalf of the customer, without losing the good will of the solicitor. It said that the whole purpose of the 'Reasonable Offer Made' procedure (ROM) and conciliation was not to get highest amount possible but to help the parties reach an agreement with which the customer was happy.

6.9 The Society said that 'ROM' referred to the 'Reasonable Offer Made' procedure and was a tool to enable the LCS to close the file without adjudication where the solicitors made reasonable proposals to deal with the inadequacy of the service they had provided but where the customer refused to conciliate or to compromise his/her expectations.

7 Adjudication

Dr Lewis' request was for information about the denials by H-LLP of having received his complaint dated 27 August 2008. Dr Lewis told the Law Society that 'the denials were made by telephone but both caseworkers must have made a note of the conversation' and he asked 'May I have copies of those notes please?' From this I take it that Dr Lewis wanted, from any TANs of conversations between the two caseworkers and H-LLP, any information about the firm's denial of having received his complaint.

I accept that, when he replied to Dr Lewis on 9 December 2009, Mr Stanley had reviewed all the TANs which were then in the Law Society's possession of conversations between the caseworkers and the firm. I also accept that Mr Stanley believed that those held on the electronic database would exactly mirror all those held in the manual file (which was then with the LSO and unavailable to review).

Now the Society has established that there were some TANs, held uniquely in the manual file, of conversations between Ms Jones and H-LLP on three dates in December 2008 and January 2009 (though one appears to have been incorrectly dated as 2008). I am satisfied that none of them contains any reference to the firm's

denial of having received Dr Lewis' complaint, so I judge them to be outside the scope of his request.

There is no clear explanation of the note made by Ms Choudhury, in the TAN of a conversation on 6 March 2009 with Dr Lewis, that the 'firm had reviewed files and confirmed [that they had not received the complaint] by telephone'. Ms Choudhury may have been recalling a telephone conversation of which no TAN was made, or she may have been referring mistakenly to the information contained in the internal H-LLP memo which had been provided to the LCS and copied by Ms Jones to Dr Lewis in February.

The Law Society originally declined to release copies of the TANs it discovered on the electronic file of conversations between Ms Choudhury and H-LLP. The Society cited two reasons: that the TANs did not contain information of the sort Dr Lewis had asked for; and that the public interest was against disclosing them. On further consideration the Society has now provided Dr Lewis with one complete TAN and one redacted TAN. The Society has confirmed to the adjudicator that it will provide a copy of the TAN dated 11 March which was held in the manual file and which includes a handwritten note by Ms Choudhury which did not appear on the version held in the electronic file and which is directly relevant to Dr Lewis' request. Once this has been given to Dr Lewis I am satisfied that he will have received all the information covered by his original request.

It is clear to me that the Law Society's original judgement that these two TANs, even in their electronic form, contained no relevant information was wrong. But now that the relevant information has been released there is no need to adjudicate further.

I agree with the Law Society that the information concerned falls within s14.5 of the Code, being information 'about specific investigations, disciplinary cases or applications arising from our regulatory role'. Where the release of regulatory information is concerned, the Code requires the adjudicator to consider where the balance of public interest lies in the release or withholding of the information. The Law Society's original submission argued that the balance of public interest was against disclosure of details of the conciliation discussions between the LCS and the firm. The redaction now made by the Society to the TAN dated 11 March 2009 has enabled Dr Lewis to receive the information he wanted without disclosing information about the conciliation process, so it is not necessary for me to take a view of the Society's argument about the balance of public interest in relation to releasing information about the conciliation process.

No further action is therefore required and no finding is necessary.

Richard Ayre

Freedom of Information Adjudicator

14 February 2010